9-2000-9984-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Appeal by Stephen L. Quade of the Department of Natural Resources' Limited Permit #95-1102 to Construct Three Wildlife Ponds in Wetland 29-320W, Hubbard County, Minnesota.

ORDER GRANTING DEPARTMENT'S MOTION FOR PARTIAL SUMMARY DISPOSITION AND DENYING APPLICANT'S MOTION

Steven L. Quade (hereinafter Applicant) applied for a permit from the Department of Natural Resources to create three wildlife ponds in the area identified as wetland 29-320W. That permit was granted. Applicant sought an amendment to the permit to construct a roadway, which was denied. Applicant appealed the denial. On August 25, 1995, a Notice and Order for Hearing was issued by the Commissioner of Natural Resources, setting a hearing date of October 18, 1995. The hearing was continued indefinitely to allow the parties to determine if wetland 29-320W (hereinafter 29-320W) was properly designated a public water.

On October 20, 1995, the Department of Natural Resources (DNR or Department) filed a motion for partial summary disposition on the issue of whether 29-320W is a public waters wetland and is properly under the jurisdiction of the DNR.

On November 8, 1995, Applicant moved for summary disposition on the ground that 29-320W is not a public waters wetland as defined in Minn. Stat. § 103G.005, subd. 18, and the DNR lacks jurisdiction over the property. The motion also contained a request for attorney's fees and costs pursuant to Minn. Stat. § 14.62, subd. 3. Reply memoranda were received from both parties and the record in this matter closed on December 27, 1995.

The Department is represented by Assistant Attorney General David P. Iverson, Suite 900, 445 Minnesota Street, St. Paul, Minnesota 55101-2127. Applicant is represented by Gerald T. Carroll, Carroll & Leighton, 100 South Fifth Street, Suite 2250, Minneapolis, Minnesota 55402-1221.

Based on all of the files and proceedings herein, and for the reasons set forth in the attached Memorandum, the Administrative Law Judge makes the following:

ORDER

That the Department's motion for partial summary disposition be GRANTED, and that the Applicant's motion for summary disposition and attorney's fees and costs be DENIED.

Dated this ____ day of March, 1996.

_____

PHYLLIS A. REHA
Administrative Law Judge

MEMORANDUM

I.

Both the Department and Applicant have filed motions for summary disposition in this matter. Summary disposition is the administrative equivalent to summary judgment. Minn. Rules pt. 1400.5500(K). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Louwagie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. Civ. P. 56.03. The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested cases. See Minn. Rules pt. 1400.6600.

It is well established that, it order to successfully resist a motion for summary judgment, the non-moving party must show that specific facts are in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees Federal Credit Union, 384 N.W.2d 853, 855 (Minn. 1986). The existence of a genuine issue of material fact must be established by the non-moving party by substantial evidence; general averments are not enough to meet the non-moving party's burden under Minn. R. Civ. P. 56.05. Id.; Murphy v. Country House, Inc., 307 Minn. 344, 351-52, 240 N.W. 2d 507, 512 (1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1988). Summary judgment may be entered against the party who has the burden of proof at the hearing if that party fails to make a sufficient showing of the existence of an essential element of its case after adequate time to complete discovery. Id. To meet this burden, the party must offer "significant probative evidence" tending to support its claims. A mere showing that there is some "metaphysical doubt" as to material facts does not meet this burden. Id. Based upon the memoranda and affidavits filed by the

parties, there appear to be no relevant facts in dispute regarding the limited issues in the partial motion of summary disposition filed by the Department and the motion filed by Applicant.

II.

Regarding the issues to be considered in this motion, there do not appear to be any facts in dispute. Applicant maintains that the DNR lacks jurisdiction over the area alongside Judicial Ditch No. 1 and Lateral No. 3 to require a permit for constructing a roadway. Judicial Ditch No. 1 was established in 1920, pursuant to the order of the County Court. Applicant's Exhibit 1. The adjacent landowners, including the predecessor owner of the land owned by Applicant, were assessed for the costs of creating and maintaining the ditch and its laterals. This ditch has not been well maintained over the years. Lateral No. 3 extends toward the location within 29-320W where the Applicant seeks to create three wildlife ponds. The lateral is flanked by berms created from the spoil generated by the original excavation of the ditch. These berms have been saturated by water and are in danger of collapse if heavy equipment or vehicles are driven over the berms. In addition to the wildlife ponds, Applicant seeks to make a roadway for moving equipment and vehicles alongside the lateral. The Department maintains that all but a small portion of the proposed roadway lies below the ordinary high water level (OHWL) of 29-320W and, therefore, a permit from the DNR is required before the work required to create a roadway can be performed at the proposed location.

Three different theories are asserted by Applicant to support the conclusion that the DNR lacks jurisdiction over the area in dispute as a matter of law. First, Applicant asserts that as the owner of the land adjacent to the judicial ditch and lateral, certain rights were created by the designation of the judicial ditch and assessment of fees. Second, Applicant asserts that irregularities in the public waters inventory (PWI) of 29-320W renders the designation of the land as public waters defective. Lastly, the proposed work to be performed by Applicant is claimed to be maintenance authorized by Minn. Stat. § 103E.701. The Applicant claims that maintenance work may be completed without a permit under 103E.701. The Department responds that none of the Applicant's arguments are valid and partial summary disposition on the issue of jurisdiction should be granted to the DNR. (The Department acknowledges that the issue of OHWL of wetland 29-320W is an appropriate issue to be addressed in the contested case hearing.)

III.

A line of cases is cited by Applicant to establish that property rights are created along with the creation of judicial ditches. See Applicant's Memorandum, at 4-6. The Department responds that "the rights created by the existence of the drainage system are to the continued maintenance of the ditch for the purpose for which it was established." Department Reply, at 3. In Lupkes v. Town of Clifton, 196 N.W. 666 (Minn. 1924), the Minnesota Supreme Court held that an assessment for a judicial ditch creates a property right in the benefit created by the ditch, and the proceeding

establishing the ditch is a judgment in rem. As a judgment in rem, the right created is established against all others and can only be altered by a subsequent proceeding. Id. at 668. Applicant maintains that the Supreme Court's holding establishes his right to do work in the area alongside the lateral and ditch created in 1920.

The underlying dispute in Lupkes was that drainage off of the landowner's farm, accomplished by a judicial ditch, was impaired by a local government's road maintenance. Regarding the rights of the landowner the Court stated:

> Now such an imposition [assessments for a judicial ditch] cannot be made under our Constitution, except upon the theory that B. has been given, and by the construction of the ditch is assured, the benefit for which he is compelled to pay. If it were otherwise, our method of collecting the cost of ditch construction would not stand for a moment the constitutional due process test.
>
> That being the case, it would be a shocking result indeed, if in any manner, however subtle, a way could be found to take away from the landowner the distinct and affirmative benefit forced upon him by his government, and for which his government has compelled him to pay, without making the adequate compensation required by the Constitution when private property is taken for public use.
>
> Unless, under the law, the courts have not only the power but are under the duty to compel all concerned to respect the new status created by governmental authority in the construction of ditch No. 40, the plaintiff will have been deprived of just such a right, a property right appurtenant to his farm. **By the ditch proceedings he acquired the right to have the new water course intercept the ravine on his south boundary, and to the extent of its capacity to have it keep off his land the waters which formerly flowed onto and across the same through the ravine**. A new status was thereby created, to the benefits of which plaintiff is entitled. To hold now that any authority has the right to cut away the embankment or any part of it, or to fill the ditch so as to restore in whole or in part the old drainage onto plaintiff's land, would be to deprive him of a property right. If that is to be done by governmental agency, it must be done under the power of eminent domain, after first making adequate compensation.

Lupkes, 196 N.W. at 668-69 (emphasis added).

The Supreme Court clearly stated in Lupkes what rights are acquired by ditch proceedings. Those rights are related to the drainage of public waters, not doing work (e.g. constructing a road) in a public waters wetland. This holding was reinforced by the Supreme Court's holding in In Re the Application of Christenson, 417 N.W.2d 607 (Minn. 1987). The Supreme Court assessed the effect of Minn. Stat. § 105.38(1), which states "Subject to existing rights all public waters and wetlands are subject to the control of the state." Minn. Stat. § 105.38(1), (1986). The protection of existing rights was held

to mean “riparian rights”--the rights to the use and enjoyment of the public water or wetland, such as hunting, fishing, hiking, harvesting hay or wild rice. Riparian rights do not include the right to drain or perform construction type work in a public water or wetland. The riparian owner does not own the public water or wetland; the riparian owner only owns the right to the use and enjoyment of the public water or wetland. In Re Christenson, at 614. The establishment of a judicial ditch does not establish a right to construct a roadway in a wetland without a permit. Applicant maintains that Christenson only applies to private ditches. The ditch in Lupkes was a judicial ditch. There is no relevant distinction to be made in this case between a public or a private ditch. There is no existing right to create a roadway without a permit in a wetland that is protected by Minn. Stat. § 105.38(1).

Minn. Stat. § 103E.011, subd. 1(1), allows a drainage authority to maintain ditches under its jurisdiction. No permit is required for such maintenance. If other work is to be performed in a wetland, the drainage authority “may apply to the commissioner for permission ....” Minn. Stat. § 103E.011, subd. 3(b). As to Judicial Ditch No. 1 and Lateral No. 3., the Hubbard County Board of Commissioners is the drainage authority. Applicant’s Exhibit 6. No action is being proposed by the Hubbard County Board regarding the ditch. The statutory grant of authority is limited to ditch maintenance. Constructing a permanent roadway is beyond the scope of ditch maintenance. Under Minn. Stat. § 103E.011, subd. 3(b), a permit would be required for undertaking such a project. Neither the claim of riparian rights nor the Hubbard County Board’s statutory authority under Chapter 103E support granting summary disposition to Applicant.

IV.

When the PWI was performed in 1984, the Hubbard County Hearings Unit conducted an inquiry into the nature of lands in Hubbard County and attempted to resolve disputes regarding whether any particular land should be listed on the PWI. The Hearings Unit issued Findings of Fact, Conclusions, and Order dated April 6, 1984. The Findings identified the location of 29-320 as “sec. various, T 138;139, R 31-32.” The land is identified as a type III wetland. Other facts are identified in the Findings as:

> No definable banks. Private land ownership should not be included within the protected water basin. It would be economically feasible for the private lands to be developed for agriculture. * The area should be changed from a basin (P) to a wetland (*).

The Hearings Unit Order reflected the Findings of Fact. The parcel designated 29-320, further identified as “Section various, Township 138; 139, Range 31;32”, is designated as wetlands. There is nothing in the Order indicating that private lands are in any fashion exempt from the designation of wetlands.

Since Section 28, Township 139, Range 32, is not specifically identified in the Hearings Unit Order, Applicant argues that the PWI does not include the land at issue here. Applicant relies upon the lack of any specific identification and the notation that “private land ownership should not be included in the protected water basin” to support

the claim that the land at issue in this matter was never listed in the PWI. Applicant's Memorandum, at 11. Applicant asserts that the DNR requires exact descriptions of land before a permit is issued and, therefore, an exact description must be required to include the land on the PWI. Id. at 12.

The Department replied that the statute governing the wetlands inventory does not provide any requirement that the land's legal description be used to identify wetlands. Department's Reply, at 5-6. DNR maintains that the description within the Hearings Unit Order is accurate and provides sufficient description of the location to afford adequate notice of the listing of 29-320W on the PWI. Id. at 6. The DNR urges that the notation in the Findings of Fact that private land should be exempted from the inventory be dismissed, since there is no statutory basis for excluding "land which could feasibly be developed for agriculture." Department's Reply, at 7-8.

Minn. Stat. § 103G.201 requires that the Commissioner of Natural Resources prepare a "public waters inventory map of each county that shows the waters of this state that are designated as public waters under the public waters inventory and classification procedures ...." The PWI statute does not state what, if any, impact the listing of a wetland on the PWI is to have. The statutory provision purporting to express those impacts states:

> The designation of waters of this state as public waters does not:
>
> (1) grant the public additional or greater right of access to those waters;
>
> (2) diminish the right of ownership or usage of the beds underlying the designated public waters;
>
> (3) affect state law forbidding trespass on private lands; and
>
> (4) require the commissioner to require access to the designated public waters under section 97A.141.

Minn. Stat. § 103G.205.

There is no indication that listing on the PWI is intended to limit what is properly considered a wetland. The statutory definition of wetlands in Minn. Stat. § 103G.005, subd. 18, is separate and unaffected by the PWI. The parties do not dispute that the wetland designated 29-320W appears on the PWI map. Applicant has not advanced an argument that he lacked notice that 29-320W is a wetland. The initial application for a permit recognized that performing work in 29-320W falls under the jurisdiction of the Department. There is no issue raised regarding the jurisdiction of the DNR by the PWI's failure to use the full legal description of the property constituting 29-320W on the Order establishing the wetland's place on the inventory.

V.

Applicant has requested attorney's fees and costs under Minn. Stat. § 14.62, subd. 3. That statute authorizes the award of fees to a "prevailing party other than the state" in a contested case pursuant to Minn. Stat. § 15.471-475 (known as the Minnesota Equal Access to Justice Act or MEAJA). At this stage of the contested case process, there is no final agency decision. Such a decision must be made by the Commissioner of Natural Resources. Until final agency action is taken in this matter, a request for attorney's fees and costs under the MEAJA is premature. Therefore, Applicant's request for attorney's fees and costs is denied.

VI.

In summary, Applicant has asserted that the Department lacks jurisdiction in this matter due to the existing rights of Applicant arising out of the creation of Judicial Ditch No. 1. There are no such rights affecting DNR's jurisdiction to control work performed in wetlands by requiring permits for such work. Applicant maintains that the land at issue was not sufficiently described in the PWI. The Department's jurisdiction over work performed in 29-320W is not affected by the broad description of the wetland in the PWI. The OHWL of 29-320W is disputed. This is a genuine issued of material fact that must be decided at hearing. The Department's jurisdiction extends only to those portions of the proposed roadway that lie below the OHWL. Final disposition on the issue of jurisdiction can only be granted after the OHWL has been determined. However, summary disposition on the arguments advanced by Applicant can be entered. There are no genuine issues of fact on rights arising from the creation of Judicial Ditch No. 1 or the method of listing the wetland on the PWI. Regarding those issues, summary disposition in favor of the Department is GRANTED.

P.A.R.